

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Judges Beckering, Borrello, and Kelly

HELEN YONO,

Plaintiff-Appellee,

v

MICHIGAN DEPARTMENT OF
TRANSPORTATION,

Defendant-Appellant.

Supreme Court No. 150364

Court of Appeals No. 308968

Court of Claims No. 11-000117-MD

**BRIEF ON APPEAL OF APPELLANT MICHIGAN DEPARTMENT OF
TRANSPORTATION**

ORAL ARGUMENT REQUESTED

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Dated: August 5, 2015

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STATEMENT OF JURISDICTION

This Court has jurisdiction to review a decision of the Michigan Court of Appeals under MCR 7.301(A)(2). The Court granted Defendant-Appellant Michigan Department of Transportation's (MDOT's) application for leave on June 10, 2015.

STATEMENT OF QUESTION PRESENTED

1. Under the highway exception to governmental immunity, MCL 691.1402, a governmental agency is liable for defects in the “improved portion of the highway designed for vehicular travel.” Yono allegedly injured herself in a marked parallel-parking lane. Was this parallel-parking lane designed for vehicular travel?

MDOT’s answer: No.

Yono’s answer: Yes.

Trial court’s answer: Yes.

Court of Appeals’ answer: Yes.

Authority: *Grimes v Dep’t of Transp*, 475 Mich 71; 715 NW2d 275 (2011).

STATUTES INVOLVED

MCL 691.1402(1):

Each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. The liability, procedure, and remedy as to county roads under the jurisdiction of a county road commission shall be as provided in section 21 of chapter IV of 1909 PA 283, MCL 224.21. *Except as provided in section 2a, the duty of a governmental agency to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel.* A judgment against the state based on a claim arising under this section from acts or omissions of the state transportation department is payable only from restricted funds appropriated to the state transportation department or funds provided by its insurer. [Emphasis added.]

INTRODUCTION

The Governmental Tort Liability Act, 1964 PA 170, MCL 691.1401 *et seq.*, limits a governmental agency's liability for highway defects to those found in the "improved portion of the highway *designed for vehicular travel*." MCL 691.1402(1) (emphasis added). This case examines whether a parallel-parking lane falls within that limitation.

The Court of Appeals concluded that parallel-parking lanes are designed for vehicular travel because they are physically capable of supporting a vehicle. Physical capacity, however, is only one aspect of design. For example, a backyard swimming pool may be physically capable of supporting a jet ski, but backyard swimming pools are not designed for jet-ski travel. This is true even though a backyard swimming pool has a physical characteristic (i.e., water) that enables some incremental movement of a jet ski. Similarly, a highway shoulder is physically capable of supporting a vehicle, but highway shoulders are not designed for vehicular travel. *Grimes v Dep't of Transp*, 475 Mich 71, 92; 715 NW2d 275 (2011). This is true even though highway shoulders have a physical characteristic (i.e., asphalt, concrete, or gravel) that enables some incremental movement of a vehicle.

These examples demonstrate that designing a highway for vehicular travel requires more than physically composing the supporting structure. Rather, the design must incorporate other elements, including pavement markings, so that a vehicle can safely operate, with respect to itself and others, and so that the operator is aware of the intended use of the environment. These non-physical design components, known as geometrics, are an integral part of highway design. The

importance of geometrics to a functioning highway design are apparent: no one would think that the design of a highway was complete and ready for vehicular travel if the design left off the highway's pavement markings.

In holding that parallel-parking lanes are designed for vehicular travel, the Court of Appeals interpreted the word "designed" to refer only to the physical engineering of the highway surface. This interpretation overlooks the fact that the plain meaning of the phrase "designed for" is not limited to "engineered for"; rather, it also means "intended for," and the plain language "designed for vehicular travel" thus includes the parts of the highway design, including geometric design, that show how the highway is intended to be used. The holding also contradicts this Court's decision in *Grimes*, because a highway shoulder would qualify as a designed travel lane under the Court of Appeals' reworked definition of "design." Indeed, Yono makes the same mistake the *Grimes* plaintiffs made—they each assume that any "improved portion of the highway" is "designed for vehicular travel," thus rendering the latter phrase surplusage. By interpreting "design" to refer only to physical construction, the Court of Appeals marginalized MDOT's evidence of geometric design and contravened the legislative intent to allow only narrow exceptions to governmental immunity.

Under the interpretation set out in *Grimes*, a parallel-parking lane is not a travel lane "designed for vehicular travel." Because Yono's alleged defect therefore does not fall within the highway exception to government immunity, MDOT is immune from her claim.

STATEMENT OF FACTS

On July 31, 2011, Yono allegedly injured her ankle while stepping into a pothole or crumbled asphalt near M-22 in Suttons Bay. (Compl, ¶ 13, App 33a.) She then filed a notice of intent in the Court of Claims and averred that the alleged highway defect was located “at the edge of the roadway of the east side of M-22, abutting the concrete gutter and curb,” which she described as being “on the improved portion of M-22 . . . designed for vehicular travel.” (9/2/11 Notice of Intent, ¶¶ 1, 4, App 13a-14a.) She provided several photographs depicting the location of the alleged defect. (*Id.*, App 17a-31a.)

On November 7, 2011, Yono filed suit in the Court of Claims, relying on the “highway exception” to governmental immunity, MCL 691.1402, as the basis for MDOT’s liability. (Compl, ¶¶ 3, 10, App 33a.)

PROCEEDINGS BELOW

The Court of Claims denied governmental immunity to MDOT.

In the Court of Claims, MDOT moved for summary disposition under MCR 2.116(C)(7), arguing that the location of the alleged injury—a marked parallel-parking lane abutting the curb—did not fall within the “improved portion of the highway designed for vehicular travel.” MCL 691.1402(1). MDOT attached the affidavit of Gary Niemi, an MDOT Development Engineer, to describe the design of M-22. Yono replied with the affidavit of Edwin Novak.

The Court of Claims denied MDOT's motion, reasoning that "in order for a vehicle to get to the parking spot, they have to drive there." (2/1/12 Hr'g Tr, p 32 lines 9-15, App 53a.)

The Court of Appeals affirmed.

MDOT appealed the denial of immunity. On December 20, 2012, the Court of Appeals affirmed in a published opinion, concluding that the marked parking lanes were not designed for vehicular travel and distinguishing cases that held that highway shoulders and other installations are not designed for vehicular travel. *Yono v Dep't of Transp*, 299 Mich App 102; 829 NW2d 249 (2013) ("*Yono I*") (App 58a-64a.). Judge Talbot dissented, concluding that *Grimes* compelled a finding that the parking lanes fell outside the portion of the highway designed for vehicular travel. *Id.* at 120 (Talbot, J., dissenting) (App 65a-68a.).

This Court remanded to the Court of Appeals for further proceedings.

MDOT filed an application for leave to appeal on January 29, 2013. This Court requested supplemental briefs addressing "whether the parallel parking area where the plaintiff fell is in the improved portion of the highway designed for vehicular travel within the meaning of MCL 691.1402(1)." *Yono v Dep't of Transp*, 495 Mich 859; 836 NW2d 686 (2013) (App 69a.). On January 16, 2014, the Court heard argument on the application, and on April 1, 2014, the Court remanded the case to the Court of Appeals to consider two questions:

(1) [W]hat standard a court should apply in determining as a matter of law whether a portion of highway was designed for vehicular travel, as

used in MCL 691.1402(1); and (2) whether the plaintiff has pled sufficient facts to create a genuine issue of material fact under this standard. [*Yono v Dep't of Transp*, 495 Mich 982; 843 NW2d 923, 924 (2014) (App 70a.).]

On remand, the Court of Appeals again held that MDOT was not entitled to immunity.

On remand, the Court of Appeals accepted supplemental briefs and issued a published opinion again denying governmental immunity to MDOT.¹ *Yono v Dep't of Transp (On Remand)*, 306 Mich App 671; 858 NW2d 128 (2014) (“*Yono II*”) (App 71a-83a.).

First stating that this Court’s remand order was “unclear” (*id.* at 677, App 73a.), the panel reviewed Yono’s complaint and concluded that she had facially pleaded in avoidance of governmental immunity by placing MDOT on notice that she was invoking the highway exception. *Id.* at 686 (App 77a.). Alternatively, the panel suggested that Yono would have been entitled to amend her complaint had she deficiently pleaded. *Id.* at 685 (App 77a.). The panel next addressed whether MDOT provided sufficient evidence to rebut Yono’s allegations that the marked parallel-parking lane was designed for vehicular travel. It began by defining the statutory terms “designed” and “vehicle.” *Id.* at 687-688 (App 77a-78a.). The panel then rendered its understanding of the exception, but remonstrated that “[w]e are not, however, writing on a clean slate.” *Id.* at 690 (App 79a.). Rather, the panel observed that it was required to follow this Court’s “limited understanding” of the statutory language. *Id.* at 691 (App 79a.).

¹ On remand, Judge Borrello replaced Judge Talbot, due to Judge Talbot’s interim appointment to the Court of Claims.

Further lamenting that “we are no longer free to give MCL 691.1402(1) its ordinary meaning,” the panel concluded that MDOT’s duty to maintain is not limited “to that portion of the highway used as a thoroughfare.” *Id.* at 692 (App 80a.). Instead, MDOT is obligated to keep in reasonable repair “any part of the highway that was specifically designed—that is, planned, purposed, or intended—to support travel by vehicles (manpowered, animal-powered, or motorized), . . .” *Id.* Thus, to be entitled to immunity, MDOT would need to show that the parallel-parking lane “fell outside the improved portion of the highway that was planned, purposed, or intended to support regular travel by vehicles.” *Id.* at 693 (App 80a.).

The panel proceeded to review the Niemi affidavit under these standards. Despite Niemi’s reliance on state and federal design standards, the panel noted that he did not participate in the *actual* design of the highway, and it rejected what it perceived as Niemi’s assumption that the highway exception applies only to the “portion of the highway designed to sustain the heaviest regular travel.” *Id.* at 694 (App 81a.). Accordingly, it thought that Niemi’s opinions were “irrelevant” and therefore inadmissible. *Id.* at 694, 696 (App 81a-82a.). Consequently, the panel held that MDOT failed to rebut Yono’s allegations and affirmed the denial of immunity. *Id.* at 696-697 (App 82a-83a.).

This Court granted MDOT’s second application for leave.

Following *Yono II*, MDOT again applied to this Court for leave to appeal. On June 10, 2015, the Court granted MDOT’s application and instructed the parties to address:

(1) whether a vehicle engages in “travel” under MCL 691.1402(1) when it parks in, including pulls into and out of, a lane of a highway designated for parking;

(2) whether the defendant presented evidence of the design of the highway at issue which, if left un rebutted, would establish that the plaintiff fell in an area of the highway not “designed for vehicular travel” under MCL 691.1402(1);

(3) if so, whether the plaintiff produced evidence establishing a question of fact regarding the defendant's entitlement to immunity under MCL 691.1402(1); and

(4) whether questions of fact on a motion for summary disposition involving governmental immunity under MCR 2.116(C)(7) must be resolved by the trial court at a hearing or submitted to a jury[.] [*Yono v Dep't of Transp*, __ Mich __; 864 NW2d 142 (2015) (App 87a.).]

MDOT now asks the Court to: (1) hold that the marked parallel-parking lane at issue in this case is not within the “improved portion of the highway designed for vehicular travel;” (2) reverse the Court of Appeals’ holding in *Yono II*; and (3) remand for entry of summary disposition for MDOT.

SUMMARY OF ARGUMENT

Consistent with *Grimes*, this Court should hold that parallel-parking lanes are not “designed for vehicular travel” within the highway exception to governmental immunity. *Grimes* held that highway shoulders are not designed for vehicular travel simply because they support “momentary vehicular ‘travel.’” The Court correctly reasoned that interpreting “travel” that broadly would render the phrase “designed for vehicular travel” redundant with the phrase “improved portion of the highway.” *Grimes*, 475 Mich at 90, 92. *Grimes*’s reasoning applies with equal force to parallel-parking lanes. Although vehicles may engage in some incremental movement when entering or exiting a parallel-parking space, as they might when navigating a highway shoulder, vehicles do not “travel” in parallel-parking lanes, nor are such installations “designed” as travel lanes.

If the Court concludes that, unlike highway shoulders, the Legislature did not categorically omit parallel-parking lanes from the narrow statutory waiver, MDOT is still entitled to immunity with respect to *this* parking lane. MDOT rebutted Yono’s complaint with admissible evidence of M-22’s physical and geometric design. Yono did not respond to MDOT’s motion with evidence sufficient to raise a factual dispute on this issue. Therefore, MDOT was entitled to summary disposition under MCR 2.116(C)(7).

Finally, if MDOT’s entitlement to immunity cannot be decided without further factual development, the trial court should resolve the threshold issue of immunity at an evidentiary hearing.

STANDARD OF REVIEW

This Court reviews denials of summary disposition and questions of statutory interpretation de novo. See, e.g., *Grimes*, 475 Mich at 76.

ARGUMENT

In *Nawrocki v Macomb County Road Commission*, 463 Mich 143; 615 NW2d 702 (2000), this Court confirmed that the highway exception to governmental immunity applies to “the actual roadway, paved or unpaved, designed for vehicular travel.” 463 Mich at 184. In *Grimes*, it further concluded that the exception covers only the “travel lanes of a highway” and held that governmental agencies are not liable for defects in highway shoulders. *Grimes*, 475 Mich at 91. Based on these precedents, and the general principle that “exceptions to governmental immunity are narrowly construed[,]” this Court should hold that parallel-parking lanes, like highway shoulders, are not travel lanes. *Mack v Detroit*, 467 Mich 186, 196 n 10; 649 NW2d 47 (2002). Because “[n]o action may be maintained under the highway exception unless it is clearly within the scope and meaning of the statute[,]” Yono’s complaint should be dismissed. *Scheurman v Dep’t of Transp*, 434 Mich 619, 630; 456 NW2d 66 (1990).

I. A vehicle does not “travel” when pulling in or out of, or parking in, a parallel-parking lane.

In *Grimes*, this Court held that the highway exception applies to only the “travel lanes” of the highway. *Id.* at 91. It reached this conclusion because it recognized that to define “travel” so broadly as to “include the shortest incremental

movement by a vehicle on an improved surface” would “read any meaning out of the phrase ‘designed for vehicular travel.’” *Id.* at 89. As this Court explained, “[i]f ‘travel’ is broadly construed to include traversing even the smallest distance, then it must follow that every area surrounding the highway that has been improved for highway purposes is ‘designed for vehicular travel’ since such improved portions could support even momentary vehicular ‘travel.’” *Id.* at 90. But because that interpretation would mean that “every ‘improved portion of the highway’ is also ‘designed for vehicular travel,’” it would “render[] these phrases redundant” and therefore “contravene[] a settled rule of statutory interpretation.” *Id.* Accordingly, the Court held that “the shoulder is not designed for vehicular travel,” and “that *only the travel lanes* of a highway are subject to the duty of repair and maintenance specified in MCL 691.1402(1).” *Id.* at 91 (emphasis added).

Grimes’s reasoning applies with equal force to parking lanes. While a parking lane is (like a shoulder) part of the improved portion of the highway, that fact does not automatically mean that it is “designed for vehicular travel.” See *id.* at 90. Treating a parking lane as a travel lane just because it is an improved portion of the highway would render the phrases “improved portion of the highway” and “designed for vehicular travel” redundant, just as *Grimes* explained. *Id.* In short, if vehicles do not engage in “travel” when they move on highway shoulders, then they also do not when entering or exiting parallel-parking lanes. See *Grimes*, 475 Mich at 90–91.

Applying *Grimes* faithfully to this situation thus requires determining whether a parking lane is a travel lane. It is not. Parking lanes are locations where vehicles come to rest; they are not lanes for travel. Indeed, parking spaces are placed outside of the travel lanes specifically so that they will not obstruct travel in the travel lanes—so that vehicles that are traveling will not collide with vehicles that not.

All of this ties in with the common usage of “travel.” In common usage, parking is the antithesis of “travel”—parking ends or delays a journey. To “travel” is “to go or proceed on or as if on a trip or tour” or “to move, advance, or undergo transmission from one place to another[.]” *Webster’s Third New International Dictionary, Unabridged Edition*, p 2432 (1966). In contrast, to “park” is “to bring to a stop and keep standing (as a motor vehicle) at the edge of a public way” or “to leave temporarily on a public way or in an open space assigned or maintained for occupancy by automobiles[.]” *Id.*, p 1642. And it is no answer to say that “parking” involves an incremental amount of movement by the vehicle, given that *Grimes* rejected precisely that sort of argument. *Grimes*, 475 Mich at 89–90.

Parking thus ceases travel. For this reason, the Court of Appeals’ references to left or right-turn lanes, merging lanes, and exit ramps are inapt comparators. See *Yono II*, 306 Mich App at 695 (App 82a.). These installations allow travelers to continue their journeys, albeit in different directions or by accessing different travel lanes. They do not require motorists to terminate their travel, remove their vehicles from the travel lanes, or exit their vehicles.

Moreover, government agencies are not liable for defects in analogous areas that provide access to travel lanes. For example, the highway exception does not encompass a municipal parking lot, including the “passageway” between the lot and the highway. *Bunch v Monroe*, 186 Mich App 347, 348-349; 463 NW2d 275 (1990). Likewise, a “publicly owned driveway shared by two businesses” had more in common with an “alley” than a highway. *Ward v Frank’s Nursery & Crafts, Inc.*, 186 Mich App 120, 126; 463 NW2d 442 (1999). It would be incongruous to subject a government agency to liability for parking areas abutting a travel lane, but not for those separated from travel lanes through a “passageway,” driveway, or alley. Conditioning liability in this manner would encourage governmental agencies to close or relocate abutting parallel-parking lanes, which often are located in idyllic settings like downtown Suttons Bay, to the detriment of local businesses, tourists, and residents.

In the end, this Court was correct in *Grimes* to limit the definition of “travel” to movement in the travel lanes of a highway, and that limitation resolves this case: parking lanes are not travel lanes, but rather locations for vehicles that are no longer traveling.

II. Parallel-parking lanes are not “designed” as travel lanes.

Grimes also explained that even if the improved portion of the highway is capable of supporting vehicular travel, it is not necessarily designed to do so. *Id.* at 90 (“That vehicular traffic might *use* an improved portion of the highway does not mean that that portion was ‘designed for vehicular travel.’”). As *Grimes* recognized,

there are portions of the highway that are obviously improved yet not designed for vehicular travel. *Id.* at 89 (“[The Legislature] did not intend to extend the highway exception indiscriminately to every ‘improved portion of the highway.’ Otherwise, it would not have qualified the phrase.”). In other words, the Court’s analysis in *Grimes*—recognizing that treating the phrases “improved portion of the highway” and “designed for vehicular travel” as co-extensive would render them redundant, *id.* at 90—applies to this issue too. The mere fact that a parking lane is part of the improved portion of the highway—i.e., the part that has been engineered to support vehicles—does not mean it is a portion of the highway “designed for vehicular travel.”

The *Yono II* panel expanded *Grimes*’s deliberately narrow definition of design. It then rejected MDOT’s evidence of design under its new, flawed standard. Ultimately, the Court of Appeals resolved the case on its own terms without considering the conclusions contained in the parties’ affidavits. Because its holding does not comport with *Grimes* or this Court’s approach to resolving questions of governmental immunity, it should be reversed.

A. The Court of Appeals’ definition of “design” is incompatible with *Grimes* and general immunity principles.

After voicing its displeasure with this Court’s highway-exception jurisprudence, the Court of Appeals formulated its own definition of design. This definition is doubly flawed: First, it accounts only for the physical properties of the constructed roadbed. Second, it binds government agencies to the original, as-built

design, regardless if future changes are made to the operation of the highway. Both are incompatible with a narrow interpretation of the highway exception.

1. Highway design includes both physical and geometric components.

The Court of Appeals held that government agencies are liable for defects in “any part of the highway that was specifically designed—that is, planned, purposed, or intended—to support travel by vehicles (manpowered, animal-powered, or motorized), even if the lanes were designed as ‘specialized, dual-purpose, or limited-access travel lanes.’” *Yono II*, 306 Mich App at 692 (App 80a.) (quoting *Yono I*, 299 Mich App at 100).

At the outset, the Court of Appeals’ definition properly concedes that the word “designed” means “intended,” and not just “engineered.” Had the Court of Appeals applied that plain meaning, it would have correctly concluded that improved portions of the highway (such as shoulders and parking lanes) that are set apart from travel lanes by pavement markings that tell vehicles not to drive on those portions are not intended for vehicular travel. See *Grimes*, 475 Mich at 91 (“the shoulder is not designed for vehicular travel”); *McIntosh v Dep’t of Transp*, 244 Mich App 705, 710; 625 NW2d 123 (2001) (holding that an improved highway median is not designed for vehicular travel). But instead the Court of Appeals interpreted the word “designed” narrowly to mean the original engineering of the highway, thus broadening the scope of the highway exception. Its approach is inconsistent with the cardinal tenet that exceptions to governmental immunity are

to be narrowly construed. See, e.g., *Mack*, 467 Mich at 196 n 10. In short, the Court erred by focusing on how the highway was *originally expected* to be used, rather than how it was *designed* to be used. In doing so, it fell into the pitfall that *Grimes* admonished against: “[C]onflat[ing] two disparate concepts: design and contemplated use.” *Grimes*, 475 Mich at 90.

Hence, even though MDOT may have *constructed* or *engineered* a portion of the highway to physically support the weight of a vehicle, it does not follow that MDOT *designed* that portion for vehicular travel. A parallel-parking lane is a prime example of this distinction. Michigan’s 2011 Manual on Uniform Traffic Devices (MMUTCD) differentiates parking lanes from travel lanes.² The MMUTCD defines “roadway” as “that portion of a highway improved, designed, or ordinarily used for vehicular travel and parking lanes[.]” 2011 MMUTCD, p 19. “Traveled way” is defined as “the portion of the roadway for the movement of vehicles, *exclusive of the shoulders, berms, sidewalks, and parking lanes.*” *Id.*, p 22 (emphasis added). Restating these definitions in the highway exception’s terminology, the entire “roadway,” including parallel-parking lanes, is the “improved portion of the highway.” But only the “traveled way,” which specifically exempts parallel-parking lanes, is “designed for vehicular travel.”

² Section 608 of the Michigan Vehicle Code requires the Directors of MDOT and the Michigan State Police to adopt a manual and uniform specifications for traffic-control devices consistent with industry standards. See MCL 257.608. The 2011 MMUTCD is available at: <mdotcf.state.mi.us/public/tands/Details_Web/mmutedcompleteinteractive.pdf> (accessed July 29, 2015).

By focusing on what the highway can physically “support,” the Court of Appeals overemphasized the materials used in engineering the highway surface, to the detriment of other elements of highway design. But highway design requires more than shovels and asphalt. Geometric design is an equally important component of design, and it comprises the horizontal and vertical alignment of the highway, lane widths and numbers, super-elevation, and, critical here, pavement markings. (MDOT’s Application for Leave, p 15, App 86a.)

Pavement markings are an integral aspect of geometric design. They are so integral, in fact, that the 2011 MMUTCD advises that “all necessary markings should be in place” before a new highway, detour, or temporary route is open for public travel. 2011 MMUTCD, p 347. In other words, the highway design is not complete until the markings are in place to delineate for the travelers which parts of the road are the travel lanes and which are not. Pavement markings are, after all, the primary means of informing the public of the intended operation of the highway. Among their functions, pavement markings demarcate the direction of travel, delineate travel lanes from non-travel areas (like shoulders and parking lanes), and, in collaboration with other traffic-control devices, provide notice of restrictions or warnings (for example, no-passing zones). *Id.*; see also MDOT’s Application for Leave, p 15 (App 86a.).

In addition, pavement markings apprise governmental agencies of the highway’s intended operation, so that travel lanes are prioritized for pothole repair, snow removal, and other maintenance activities. While pavement markings are not

the only evidence of a highway's geometric design, they are also not, as the Court of Appeals suggested, wholly irrelevant. Rather, in any particular case, pavement markings, along with other evidence of geometric design (for example, the MMUTCD or other federal, state, or industry design standards), will provide vital information on the design and the intended use of a highway.

Rather than consider evidence of geometric design, the Court of Appeals appeared to rely solely on the physical materials used to construct the travel and parking lanes.³ The highway exception, however, is indiscriminate to the physical materials used in construction. Liability attaches to travel lanes whether they are “paved or unpaved.” *Nawrocki*, 463 Mich at 143. For example, this Court concluded that summary disposition was warranted in *Hagerty v Manistee County Road Commission*, 493 Mich 933, 934; 825 NW2d 581 (2013), not because the roadbed was gravel, but because the alleged defect (a “cloud of dust”) was not part of that roadbed. It is the government agency's intended use of areas as travel lanes, rather than the physical materials they are engineered with, that is the relevant inquiry.

The panel's wooden concept of design does not credit the multifaceted processes that government agencies undertake when designing safe highways for

³ In addition to focusing on physical construction, the Court of Appeals repeatedly construed MDOT's position as relating to the traffic volumes carried by different portions of the paved roadway. See, e.g., *Yono II*, 306 Mich App at 694 (App 81a.) (“But as we have been at pains to explain . . . the Legislature did not limit the state's duty to repair and maintain highways to . . . the heaviest, most continuous, or fastest vehicular travel.”). But actual usage has no bearing on whether a portion of a highway is designed for vehicular travel. And MDOT has not suggested that it does.

public use. It also clashes with this Court's narrow construction of exceptions to government immunity. This Court should afford the term "design" its full meaning, and courts should account for both physical and geometric elements when reviewing a highway's design.

2. Government agencies can redesign the geometric properties of a highway.

In addition to circumscribing "design" to physical properties, the Court of Appeals also depicted that term as a one-time event. Under the Court's reasoning, once the asphalt hits the ground, government agencies can modify the highway's design only by altering its physical characteristics. *Yono II*, 306 Mich App at 695 (App 82a.) ("[T]he governmental entity's decision to paint markings on the highway does not alter the fact that the highway was actually designed for vehicular travel over its full width[.]").

By its plain terms, the highway exception refers to the design of the highway, and not the highway's original conception. To hold otherwise, the exception would need to read as "the improved portion of the highway *originally* designed for vehicular travel." "It is a well-established rule of statutory construction that this Court will not read words into a statute." *Byker v Mannes*, 465 Mich 637, 646; 641 NW2d 210 (2002).

Moreover, this Court has acknowledged that government agencies will redesign roads or buildings. In *Hanson v Mecosta Board of County Road Commissioners*, 465 Mich 492, 503; 638 NW2d 396 (2002), this Court reasoned that

the highway exception does not contain “a duty to design *or redesign*.” *Id.* at 503 (emphasis added). It concluded the same with respect to the public-building exception to immunity, noting that government agencies have no “duty to design or redesign [a] public building in a particular manner.” *Renny v Dep’t of Transp*, 478 Mich 490, 500; 734 NW2d 518 (2007).

This Court remanded *Renny* to consider whether the absence of a gutter system in a newly installed roof nevertheless was defective. *Renny*, 478 Mich at 506-507. On remand, the Court of Appeals held that the new roof constituted a redesign of the building rather than a failure to maintain the prior design. *Renny v Dep’t of Transp*, unpublished opinion per curiam of the Court of Appeals, issued September 29, 2009 (Docket No. 285039), p 5. Of note here, the Court of Appeals reasoned that “buildings do not exist in a static environment” and that not “all of the possible problems inherent in a building design [are] apparent when a building is initially conceived and built.” *Id.*⁴

Similarly, not all of the potential challenges with a highway’s design are apparent during the initial design phase. One method of redesigning a highway is to change its geometric properties. In its application for leave, MDOT cited a real-life example where it redesigned a four-lane highway (two travel lanes in each direction) as a three-lane highway (one travel lane in each direction and a center turning lane) through geometric changes. (MDOT Application for Leave, p 15, App 86a.) A geometrically redesigned highway could include broadened or narrowed

⁴ This Court declined leave to appeal this decision. *Renny v Dep’t of Transp*, 485 Mich 1102; 778 NW2d 240 (2010).

shoulders, added or removed parking areas, and changes to the location or number of travel lanes, all without altering the physical roadbed. A government agency should not be forced to incur the massive costs of modifying the physical roadbed when these design changes can be effectuated through a geometric redesign.

And a redesign might be a temporary change made specifically to prohibit vehicular travel because of a safety concern. Consider the implications of focusing solely on the original design in that context. Imagine a large sinkhole appearing in single lane of a four-lane highway, in an area that was originally engineered and constructed to be a travel lane. Under the Court of Appeals' construction of the statute (where the only thing that matters is the original design, and not later markings), even if MDOT put traffic cones, barrels, signs, and paint markings to direct traffic away from the sinkhole, MDOT would still intend for vehicles to use that area as a travel lane because that is how the area was originally designed. That is not a sensible reading of the statute.

The notion that a highway cannot be redesigned without altering the physical roadbed handcuffs a government agency's ability to efficiently respond to traffic needs and exposes it to liability beyond the legislative mandate. When reviewing a highway's design, courts should consider the current, intended use of highway, rather than the original, physical construction.

B. MDOT provided sufficient evidence that this parallel-parking lane was not designed for vehicular travel.

If *Grimes* does not apply universally to parallel-parking lanes, MDOT is still entitled to immunity because it presented evidence that *this* parallel-parking lane was not designed for vehicular travel. Reviewed under a complete definition of design, MDOT's motion for summary disposition should have been granted based on the framework articulated in *Patterson v Kleiman*, 447 Mich 429; 526 NW2d 879 (1994).

Patterson distinguished motions brought under MCR 2.116(C)(7) from those under MCR 2.116(C)(8). *Id.* at 432. A party filing a motion under MCR 2.116(C)(7) may, but is not required to, file affidavits or other supporting documentation. *Id.* at 432 n 6. If supporting materials are filed, the reviewing court must consider them. MCR 2.116(G)(5). Under this rule, "[t]he contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

Although this standard is oft-cited, less attention has been given to what is required to "contradict" an allegation. This Court has not defined that term with regard to motions under MCR 2.116(C)(7). To "contradict" is to "resist or oppose in argument" or to "assert the contrary of." *Webster's Third New International Dictionary, Unabridged Edition*, p 495 (1966). As a result, MDOT could meet its burden by offering admissible evidence to "resist or oppose" Yono's allegation that the defect was located in a travel lane. *Maiden*, 461 Mich at 119.

This it did. MDOT submitted the affidavit of Gary Niemi, an MDOT development engineer whose responsibilities include highway design. (MDOT's Br in Support of Mot for Summary Disposition, Attachment 3, Niemi Aff, ¶ 3, App 37a.) Niemi described the design of M-22:

- M-22 consists of two traffic lanes (northbound and southbound) and two parallel-parking lanes. (Niemi Aff, ¶ 5, App 37a.)
- The two travel lanes measure 22 feet wide—11 feet per lane—and comply with federal and state design standards for this type of highway. (Niemi Aff, ¶¶ 6-9, App 37a-38a.)
- MDOT does not take the parallel-parking lanes into account when measuring the traveled way and/or measuring individual lane widths. (Niemi Aff, ¶ 17, App 39a.)
- The buffer zone between the northbound travel lane and the parallel-parking lane is 8.3 feet wide. (Niemi Aff, ¶ 11, App 38a.)
- The alleged defect is located between the edge of the asphalt of parallel-parking lane and the concrete gutter pan—neither of which is designed as a travel lane. (Niemi Aff, ¶¶ 11, 19, App 38a-39a.)

Niemi's affidavit thus demonstrates that M-22 is designed with two travel lanes and two parallel-parking lanes, in accordance with state and federal design standards. Contrary to the Court of Appeals' observations, Niemi did not distinguish parking lanes from travel lanes based on traffic frequencies. Niemi's conclusions, moreover, are consistent with the MMUTCD standards cited in Part II.A.1, *supra*.

Although the Court of Appeals cited the *Patterson* standards, it did not faithfully apply them. The Court admitted that it did not consider the substance of parties' competing affidavits, contrary to MCR 2.116(G)(5). See *Yono II*, 306 Mich

App at 694 n 8 (App 81a.) (“[W]e disregarded the conclusions from both experts’ affidavits.”). Rather, armed with its faulty concept of design, the Court seemingly instituted a presumption that any paved areas, including parallel-parking lanes, are designed for vehicular travel. But see *Grimes*, 475 Mich at 90 (“This interpretation renders these phrases redundant and contravenes a settled rule of statutory interpretation.”). The burden that the Court placed on MDOT was more akin to that under MCR 2.116(C)(10), because the Court required MDOT to fully disprove, rather than contradict, Yono’s allegations. This enhanced burden was inappropriate under MCR 2.116(C)(7), and particularly so considering that MDOT’s immunity was at stake.

Niemi’s affidavit, which relied on federal and state design standards to conclude that the marked parallel-parking lane was not designed for vehicular travel, *contradicted* Yono’s allegations. It was up to Yono to rebut Niemi’s affidavit with admissible evidence.

C. Yono’s conclusory rebuttal affidavit did not raise a factual dispute to the highway’s design.

In response to MDOT’s motion, Yono filed a competing affidavit. But Yono’s affiant, Edwin Novak, did not claim to be a design engineer, did not review construction plan sheets, and did not review federal or state design standards. Rather, he looked at some pictures, visited the scene, and opined that the entire paved area was designed for vehicular travel. (Yono’s Resp to MDOT’s Mot for

Summary Disposition, Attachment 10, Novak Aff, ¶¶4-9, 11, App 42a-44a.) Any layperson could have done the same.

The Court of Appeals described Novak as an “expert.” But he does not specifically label himself as an expert, nor does his affidavit cite any “scientific, technical, or other specialized knowledge” or experience with respect to highway design.⁵ MRE 702. Even assuming Novak’s expertise, his only opinion is the legal conclusion that this parallel-parking lane was designed for vehicular travel. “The opinion of an expert does not extend to legal conclusions.” *Maiden*, 461 Mich at 130 n 11; see also *In re Powers Estate*, 375 Mich 150, 159; 134 NW2d 148 (1965). Rather, “it is the exclusive responsibility of the trial judge to find and interpret the applicable law.” *People v Lyons*, 93 Mich App 35, 46; 285 NW2d 788 (1979).

Overall, Novak’s affidavit is a conclusory document that offers no insight into highway-design standards, whether in general or with respect to M-22. Nor does Novak identify a factual dispute for trial. Rather, he merely states that the paved areas are travel lanes, without any factual support to buttress that assertion. (Novak Aff, ¶11, App 44a.)

An affidavit that “constitute[s] mere conclusory allegations and [is] devoid of detail” fails to raise a genuine issue of material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 371; 547 NW2d 314 (1996). Furthermore, an affidavit can be

⁵ Novak’s affidavit does identify experience with pavement performance and maintenance, and he discusses the nature of the alleged defect at length. (Novak Aff, ¶ 3, App 42a.) While Novak might possess specialized knowledge relevant to whether the pavement was defective, he does not exhibit knowledge of highway design.

considered on summary disposition only if its substance would be admissible as evidence. MCR 2.116(G)(6). Novak's unsupported lay opinions and legal conclusions are not admissible evidence. Because Yono did not rebut MDOT's supported motion with sufficient evidence to create a factual issue as to design, MDOT was entitled to summary disposition under MCR 2.116(C)(7).

III. Questions of fact pertaining to governmental immunity should be decided by the trial court at the earliest possible stage.

Finally, if further factual development is required to decide an immunity question as a matter of law, the trial court should hold an evidentiary hearing, limited to the threshold issue of immunity, to resolve the disputed facts. In *Dextrom v Wexford Co*, 287 Mich App 406; 789 NW2d 211 (2010), the Court of Appeals considered the method under which to resolve immunity questions that hinge on factual disputes. The Court concluded that a "*trial* is not the proper remedial avenue to take in resolving the factual questions under MCR 2.116(C)(7) dealing with governmental immunity." *Id.* at 430. Instead, "caselaw supports a limited remand for an evidentiary hearing . . . for the purpose of obtaining such factual development as is necessary to determine" if a defendant is entitled to immunity as a matter of law. *Id.* at 432.

Several panels have followed this approach or cited it approvingly. See *Hunter v Sisco*, 300 Mich App 229, 243; 832 NW2d 753 (2013), rev'd on other grounds by *Hannay v Dep't of Transp*, 497 Mich 45, 88; 860 NW2d 67 (2014); *Strozier v Flint Community Sch*, 295 Mich App 82, 88; 811 NW2d 59 (2011); *Kelley v*

Manistee, unpublished opinion per curiam of the Court of Appeals, issued May 27, 2014 (Docket No. 314994), pp 5-6; *Gallagher v East Lansing*, unpublished opinion per curiam of the Court of Appeals, issued February 25, 2014 (Docket No. 311086), p 5.; but see *Sinclair v Grosse Pointe Farms*, unpublished opinion per curiam of the Court of Appeals, issued June 4, 2015 (Docket Nos. 319317, 319368, 319318, 319370, 319319, 319371), p 23 (distinguishing the “purely factual” questions regarding a sewage-disposal-system defect from *Dextrom*’s “purely legal question” of whether a function was proprietary).⁶

This Court should adopt *Dextrom*’s approach and require trial courts to decide immunity as a matter of law, even if that determination requires them to resolve underlying factual issues. “[T]he purpose of governmental immunity is to protect the governmental body, not only from liability, but from the trial itself.” *Walsh v Taylor*, 263 Mich App 618, 624; 689 NW2d 506 (2004). Governmental immunity is “effectively lost if a case is erroneously permitted to go to trial.” *Mitchell v Forsyth*, 472 US 511, 526 (1985). Even if ultimately successful in asserting immunity at trial, a government agency will have incurred costs in trial preparation, damages discovery, expert fees, and the like, not to mention the time investment of public employees. Immunity protects these resources from unwarranted depletion.

⁶ If this Court engages in the *Sinclair* majority’s line-drawing between types of immunity issues, factual disputes regarding highway design should fall on *Dextrom*’s side of the equation. Highway design is, in the *Sinclair* majority’s words, a “purely legal question that sometimes . . . cannot be determined without fact-finding.” *Id.* at p 23.

Furthermore, there is not, as the Court of Appeals suggested, tension between *Dextrom* and *Kincaid v Cardwell*, 300 Mich App 513; 834 NW2d 122 (2013). See *Yono II*, 306 Mich App at 680 n 2 (App 74a). *Kincaid* likewise involved a factual dispute on a (C)(7) motion, but it concerned the application of the statute of limitations. Statutes of limitations “are of legislative creation” and are “affirmative defenses that must be pleaded.” *Mair v Consumers Power Co*, 419 Mich 74, 85; 384 NW2d 256 (1984); *Hewett Grocery Co v Biddle Purchasing Co*, 289 Mich 225, 233; 286 NW2d 221 (1939). In contrast, governmental immunity is “a characteristic of government” rather than an affirmative defense. *Mack*, 467 Mich at 198, 201.

Due to the sovereign nature of immunity, the manner in which governmental agencies safeguard their immunity differs from the manner in which they invoke statutes of limitations and other defenses. For starters, the initial burden resides with the *plaintiff* to plead in avoidance of governmental immunity. *Id.* at 198. And, unlike the affirmative defenses contained in MCR 2.116(C)(7), which must be raised in a party’s first responsive pleading, a government agency can assert immunity at *any* time. Compare MCR 2.116(D)(2) with MCR 2.116(D)(3).

If a governmental agency disagrees with a trial court’s denial of immunity, it has the right to appeal that decision on an interlocutory basis. See MCR 7.203(A)(1); 7.202(6)(v). The principles that champion immediate appellate review of immunity denials support *Dextrom*’s approach at the trial level: both are aimed at expeditiously resolving challenges to immunity while mitigating the prejudice to

the defending government agency. Notably, this Court recently employed this reasoning to conclude that trial courts should resolve factual disputes when evaluating the affirmative defense of immunity under the Michigan Medical Marihuana Act, MCL 333.26421 *et seq.* See *People v Hartwick*, __ Mich __; __ NW2d __ (2015) (Docket Nos. 148444; 148971); slip op at 16 n 38 (“The expediency of having the trial court resolve factual questions surrounding § 4 underscores the purpose of granting immunity *from* prosecution.”). Such concerns are amplified when considering a governmental agency’s *inherent* immunity as opposed to a criminal defendant’s *statutory* immunity.

Dextrom is also consistent with the canon that the applicability of governmental immunity is a question of law for the court to decide. See *Beals v Michigan*, __ Mich __; __ NW2d __ (2015) (Docket No. 149901); slip op at 6; *Mack*, 467 Mich at 193. Indeed, *Hartwick* cited governmental immunity as support that its decision with respect to MMMA immunity was “consistent with the way claims of immunity are handled in other areas of law.” *Hartwick*, slip op at 10 n 38.

“[T]he province of the court in our constitutional system is to determine the law, regardless of its procedural posture in any given case.” *Charles Reinhart Co v Winiemko*, 444 Mich 579, 593; 513 NW2d 773 (1994). Leaving this task to juries is precarious: “[E]rrant juries may find a defendant liable on the basis of an incorrect interpretation of the law, and that finding may become immune from effective

judicial review.”⁷ *Id.* at 594. On the other hand, a “trial court’s factual findings are subject to appellate review under the clearly erroneous standard.” *Hartwick*, slip op at 18; see also MCR 2.613(C). Allowing trial courts to resolve immunity questions as questions of law will increase, rather than impede, an appellate court’s ability to remedy errors.

Likewise, jury verdicts may not deliver constructive feedback to governmental agencies. Under the facts of this case, even a verdict favorable to MDOT could leave critical questions unanswered: the jury might have rendered its verdict because parallel-parking lanes were not designed for vehicular travel, because no defect existed, because MDOT was not negligent in repairing the defect, or simply because Yono failed to meet her evidentiary burden on any one of these issues. MDOT would have no guidance by which to tailor its future conduct. Worse, juries could render inconsistent verdicts on seemingly indistinguishable facts. This would leave government agencies uncertain of the contours of their immunity.

“Resolution . . . by the court, on the other hand, will provide, through an accumulation of cases, a body of precedent which will stand as a point of reference[.]” *People v D’Angelo*, 401 Mich 167, 175; 257 NW2d 655 (1977). This certainty will benefit government agencies and the general public alike.

Government agencies will be fully aware of their obligations and liabilities, and the

⁷ The Court of Claims Act, MCL 600.6401 *et seq.*, which governs claims against the State and its agencies, does not provide for jury trials. See MCL 600.6443. Juries, however, are available to plaintiffs seeking relief from other governmental entities.

public will have a dependable standard by which to evaluate the performance of those duties.

Therefore, when a government agency's entitlement to immunity is predicated on disputed facts, the trial court should resolve that factual dispute, through either an evidentiary hearing or other appropriate procedure, at the earliest possible stage.

CONCLUSION AND RELIEF REQUESTED

“[O]ne basic principle” guides this Court’s decision: “[T]he immunity conferred upon governmental agencies is broad, and the statutory exceptions thereto are to be narrowly construed.” *Nawrocki*, 463 Mich at 158. Consistent with this standard, and this Court’s decisions in *Nawrocki* and *Grimes*, the Court should hold that parallel-parking lanes are not “designed for vehicular travel” under the highway exception to governmental immunity.

Accordingly, the Court should reverse the Court of Appeals and remand this case for entry of summary disposition in MDOT’s favor.

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Dated: August 5, 2015